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Business Associations

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Business Associations

Business Associations; alcoholic beverage wholesalers

Business and Professions Code §23021 (amended).

SB 621 (Zenovich); STATS 1973, Ch 453

Support: Host International, Inc.

Opposition: Department of Alcoholic Beverage Control

Section 23021 of the Business and Professions Code defines an alcoholic beverage wholesaler as any person, other than a manufacturer, winegrower, or rectifier, who deals in alcoholic beverages as a jobber or wholesale merchant. Prior to amendment, it was questionable whether this definition included an out-of-state wholesaler [*See* 55 OPS. ATT'Y GEN. 208 (1972)]. This section has been amended to expressly include persons located inside or outside of the state; however, this section does not apply to one who is engaged in a wholesale business in a territory or possession of the United States.

By redefining the term "wholesaler," Chapter 453 has excluded all wholesalers located in a territory or possession of the United States from the "tied-house" restrictions of Chapter 15 (commencing with §25500) of the Business and Professions Code. Therefore, any such wholesaler is no longer prohibited from holding an interest in a retail alcoholic beverage business licensed in California.

See Generally:

- 1) 55 OPS. ATT'Y GEN. 208 (1972).

Business Associations; bank securities acquisition

Financial Code §855 (repealed); Article 7 (commencing with §700) (new); §§1206, 1383 (amended).

SB 902 (Bradley); STATS 1973, Ch 744

Article 7 (commencing with §700) has been added to the Financial Code to provide, in general, that any person attempting to gain control of a bank must obtain the approval of the Superintendent of Banks. If he fails to do so, the superintendent may seek to enjoin him from pursuing such activities, and he may be denied voting privileges with respect to any security acquired contrary to the law.

"Control" is defined in Section 700 as possession, whether direct or indirect, of the power to direct or cause the direction of the management and policies of a person. This power may be acquired through any means, including, but not limited to, the ownership of voting securities or by contract (other than a commercial contract for goods or nonmanagement services). However, a person does not have control merely because he is the director or an officer or employee of another person. The determination of control in fact lies with the superintendent. A presumption of control does arise, however, when any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent or more of the outstanding shares issued by another person. Section 700(d) defines a "person" as including individuals as well as any type of organization or combination.

Section 701 delineates the acts which are prohibited absent an approval by the superintendent. These acts include: (1) making a tender offer for, a request or invitation for tenders of, or an offer to exchange securities for any voting security or any security convertible into a voting security of a bank or a controlling person if the offeror would, directly or indirectly, acquire control of the bank or controlling person by the consummation of the transaction; (2) soliciting approval of any shareholder of a controlling person for a merger, consolidation, sale of assets, or any other transaction by which a person other than such controlling person would acquire control of the bank; or (3) acquiring control of a bank or a controlling person. A person is not, however, prohibited from negotiating to acquire control of a bank or a controlling person provided that he does not actually gain such control.

Sections 702 and 703 specify the procedures by which a person may apply for approval of acquisition of a controlling interest and the grounds for denial of approval. Specifically, the superintendent must approve an application for acquisition of control unless one or more of the following conditions is present: (1) the proposed acquisition of control would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the state; (2) the proposed acquisition would substantially lessen competition, tend to create a monopoly, or would constitute a restraint of trade and the public need and convenience of the community to be served does not substantially outweigh the anticompetitive effects; (3) the financial condition of any acquiring person may jeopardize the

financial stability of the bank or the controlling person, or may be prejudicial to the interests of the depositors, creditors, or shareholders of the bank or controlling person; (4) the plans or proposals to make major changes in the business, including liquidation, sale of assets, and merger or consolidation, are not fair or reasonable to the depositors, creditors, or shareholders of the bank or controlling person; (5) the acquiring person's competence, experience, or integrity is such that it appears it would not be in the best interest of the depositors, creditors, or shareholders of the bank or the controlling person, or in the interest of the public to allow the acquisition; (6) the proposed acquisition is unfair, unjust, or inequitable to the bank or the controlling person or to the depositors, creditors, or shareholders of the bank or the controlling person; or (7) the applicant neglects, fails, or refuses to furnish the superintendent with all required application information.

Section 708 authorizes the superintendent to exempt transactions from the purview of Article 7 if he finds that regulation of the transaction is not necessary or appropriate for the public interest or for the protection of a bank, a controlling person, or the depositors, creditors, or shareholders of the bank or controlling person. Sections 704 and 705, respectively, authorize the superintendent to impose reasonable and necessary conditions on an approval of acquisition and to alter, suspend, or revoke an approval for good cause.

Section 707 authorizes the superintendent to hold a hearing before determining whether a person controls another person or before denying or approving an application for approval. Any person who is prejudiced by a decision concerning control or denial of an application for approval may file a request for a hearing. The superintendent must hold a hearing and affirm, modify, or reverse his decision within 30 days after receipt of the request, unless the person filing the request consents to an extension of time. Under Section 706 an application which is not approved or denied by the superintendent within 60 days after the complete application has been received, or within the extended period of time consented to, is deemed approved.

Section 709 authorizes the superintendent to apply to the superior court for an order enjoining any person from violating or continuing to violate this article or any regulation or order of the superintendent adopted pursuant thereto. He may also apply for other equitable relief as required by the nature of the case or interests of the bank, the controlling person, the depositors, creditors, or shareholders of the bank

or controlling person, or the public. Section 710 prohibits any person from voting or giving written consent with respect to any security acquired in contravention of any provision of this article or any regulation or order of the superintendent adopted pursuant thereto for a period of three years after such acquisition. Furthermore, if a security of a bank or a controlling person is acquired in contravention of this article or an order or regulation of the superintendent, the bank, the controlling person, or the superintendent may apply to the superior court for equitable relief to enjoin the acquiring person from voting or giving any written consent with respect to the securities for a period of three years. Included within the relief are costs (except with respect to the superintendent) and attorneys' fees. Additionally, the superintendent may apply to the superior court for equitable relief, including costs, to void any voting or any giving of written consent with respect to any securities acquired in contravention of the provisions of this article or the superintendent's regulations or orders, which may have occurred since the acquisition.

Section 711 declares that the provisions of Article 7 are severable. Thus the invalidity, illegality, or unenforceability of one provision or clause, by itself or as applied in particular circumstances, does not affect the validity of other provisions or clauses which can be given effect without the invalid provision.

Business Associations; California Commodity Law

Corporations Code §§25106, 29504, 29504.1, 29505, 29506, 29507, 29507.1, 29508, 29508.1, 29509, 29510.1, 29510.2, 29510.3, 29510.4, 29513.1, 29513.2, 29513.3, 29537.1, 29537.2, 29538.1, 29538.2, 29538.3, 29543, 29544, 29545, 29563, 29564, Chapter 8 (commencing with §29580), Chapter 9 (commencing with §29590) (new); §§29500, 29502, 29511, 29512, 29513, 29514, 29515, 29516, 29517, 29526, 29527, 29535, 29537, 29538, 29539, 29540, 29541, 29551, 29560, 29561 (amended). AB 799 (Badham); STATS 1973, Ch 854 (Effective September 25, 1973)

Requires the licensing of commodity advisors, commodity exchanges, floor brokers, commodity solicitors, commodity option issuers, and commodity salesmen; authorizes the commissioner to regulate the manner in which the licensees conduct their business; provides for certain disciplinary actions against such licensees; authorizes the commissioner to seize records of licensees in order

to investigate violations of the California Commodity Law; empowers the commissioner to bring an action to enjoin persons from violating the provisions of this law; regulates the advertising of commodities and commodity transactions; defines the damages which an injured party may recover for violations of specified sections; provides a statute of limitations for certain civil actions; grants immunity from civil actions for persons acting in good faith.

There has been a recent, rapid growth in California of public participation in commodities trading [A.B. 799, CAL. STATS. 1973 c. 854, §48]. Correspondingly, there has been an outgrowth of many businesses which deal in commodities and are not subject to regulation under the Federal Commodity Exchange Act. As a result the California Commodity Law [CAL. CORP. CODE div. 4.5 (commencing with §29500)] has been enacted to provide a comprehensive system for the licensing and regulation of individuals-engaged in commodities transactions.

Chapter 2 (commencing with §29510) specifies the licensing requirements and application procedures, including consent to service of process, for commodity advisors, commodity exchanges, floor brokers, commodity solicitors, commodity option issuers, and commodity salesmen. Generally, any such person must either be registered with the commodity exchange under which he conducts transactions or he must be certificated by the Corporations Commissioner. Sections 29511, 29512, 29513, 29513.1, 29513.2, and 29513.3 exempt certain persons from the licensing requirements set forth in Section 29510 *et seq.* These exemptions are based on three criteria: (1) prior licensing under other sections of this act or under other state or federal laws; (2) the individual is conducting business on a California commodities exchange or an out-of-state exchange; or (3) the class of persons with whom the individual deals. Additionally, Section 29514 authorizes the commissioner to exempt certain classes of persons from the licensing requirements if he finds that it is necessary or appropriate in the public interest or for the protection of investors. He may also exempt any class of person or transactions from the provisions of Division 4.5 (commencing with §29500) if he finds: (1) that such exemption is in the public interest and for the protection of the investors; and (2) the regulation of such persons or transactions is not essential to the purposes of this division.

Chapter 4 (commencing with §29535) delineates the manner in which the commissioner may regulate persons engaged in commodity transactions. Section 29537 requires the Corporations Commissioner to prescribe necessary and appropriate rules with respect to commodity

advisors who have custody of their clients' commodity contracts or funds, or who have any power of attorney to execute transactions on behalf of their clients. This section has been amended to require that the commissioner also prescribe such rules with respect to commodity exchanges, commodity option issuers, floor brokers, and commodity solicitors. Section 29537.1 has been added to require that all commodity exchanges adopt and maintain reasonable and appropriate provisions governing the conduct of their operations. A reasonable and fair method of disciplining persons authorized to transact business on the exchange must be included among the other provisions required by this section. Section 29538.3, as added, specifies the manner in which a floor broker, commodity solicitor, or commodity salesman may contest the disciplinary action taken by a commodity exchange. Section 29537.1 also empowers the commissioner to request or, after due notice and hearing, require a commodity exchange to adopt, amend, rescind, or suspend any provision so adopted. Additionally, the commissioner is authorized to require that a commodity exchange adopt and maintain such rules and regulations which are necessary to protect the public against the conflict of interest involved when a member of an exchange executes transactions for himself and for members of the public. Section 29537.2 has been added to prohibit persons who are licensed under Chapter 2 (commencing with §29510) from engaging in any commodity transaction or from inducing or attempting to induce the purchase or sale of any commodity or commodity contract in this state in contravention of the rules which are promulgated by the commissioner.

Section 29545 has been added to empower the commissioner to regulate the sale or offering of a commodity option contract. Anyone who offers or sells a commodity option contract, or any guarantor thereof, must obtain a permit from the commissioner. The permit shall contain such terms and conditions as the commissioner may reasonably require to govern commodity option contracts. Section 29545 (c) specifies the conditions upon which the commissioner is authorized to deny, suspend, or revoke a commodity option permit. Generally these conditions focus upon: (1) whether the issuer, guarantor, or underwriter has followed practices appropriate for the reasonable safety of the investors; (2) the permittees inability to fulfill his financial obligations to the optionees; (3) noncompliance with the provisions of Division 4.5; and (4) whether the terms of the commodity option contract or the guaranty thereof are fair, just, and equitable or whether the manner and method by which such contracts are offered or sold

provides for fair, reasonable, and timely disclosures to, or are such as will work a fraud upon, prospective purchasers. Any order denying, suspending, or revoking a permit under the authority of Section 29545(c) must be preceded by appropriate notice and hearing. However, the commissioner is authorized under Section 29545(h) to summarily suspend a permit if, in his opinion, the commodity option issuer is operating either: (1) in violation of the provisions of the California Commodity Law; or (2) in an unsafe or dangerous manner. This section also sets forth the manner by which a permittee may contest any such suspension.

Section 29538 authorizes the commissioner to deny, suspend, or revoke a commodity advisor's certificate for the commission of specified acts or omissions by either the commodity advisor or specified employees. This section has been amended to additionally authorize the commissioner to deny, suspend, or revoke the certificate of a commodity exchange, commodity option issuer, floor broker, commodity solicitor, or commodity salesman for any such acts or omissions. Section 29538.1 has been added to authorize the commissioner to censure, suspend for a period not exceeding 12 months, or bar from certain positions of employment, management, or control any person who is subject to the provisions of Section 29538 as amended. In addition, any partner, officer, director, employee of, or other person performing similar functions for any such person may be similarly disciplined. The commissioner may take such action only if he finds: (1) the censure, suspension, or bar is in the public interest; and (2) the person subjected to the censure, suspension, or bar has committed one of the proscribed acts enumerated in Section 29538. Section 29538.2 has been added to provide a statute of limitations for certain disciplinary actions brought under the authority of Sections 29538 and 29538.1. The proceedings barred by the provisions of this section include, but are not limited to, disciplinary actions based on: (1) any punishment for the conviction of a crime involving moral turpitude which was completed more than ten years prior to the commencement of the proceedings; and (2) any civil judgment which could be the basis for disciplinary action if the judgment became final more than ten years prior to the commencement of the proceedings. Section 29539 has been amended to provide that no order under Section 29538 or 29538.1 may be entered except after notice to the person affected.

Section 29540 provides that any person whose certificate as a commodity advisor has been suspended or revoked shall immediately surrender his certificate to the commissioner. This section has been

amended to encompass the suspension or revocation of any certificate issued under the provisions of Chapter 2 (commencing with §29510). Section 29541 has been amended to provide for the voluntary surrender and summary revocation upon specified grounds of any person so licensed. This section also authorizes the commissioner to establish procedures for the withdrawal of registration of a floor broker or commodity solicitor from a commodity exchange.

Section 29535 requires all commodity advisors to keep any records and to file or publish any reports that the commissioner may by rule require [See CAL. ADMIN. CODE tit. 10, §§350.537, 360.535 (rules prescribed by the commissioner)]. All records referred to in this section are subject at any time to such reasonable periodic, special, or other examinations by the commissioner as he deems necessary or appropriate in the public interest or for the protection of investors. This section has been amended to require all persons licensed under the provisions of Chapter 2 (commencing with §29510) to also keep such records and submit to such investigations. Section 29561 authorizes the commissioner in his discretion to: (1) make such public or private investigations as he deems necessary to determine whether any person has violated or is about to violate any provision of the California Commodity Law; and (2) publish information concerning any such violation. This section as amended also authorizes the commissioner for a reasonable time, not exceeding 30 days, to take possession of the records of any person licensed under Chapter 2 (commencing with §29510) in order to facilitate an investigation authorized by this section. Any such seizure must be accomplished by placing a keeper in exclusive charge of the records in the place where they are usually kept. No person may remove or attempt to remove any of the records except pursuant to a court order or with the consent of the commissioner. However, the directors, officers, partners, and employees of the person whose records are seized may make entries reflecting current transactions.

Section 29560 authorizes the commissioner to bring an action in the name of the people of the State of California to enjoin any person who is engaged or about to engage in any activity which constitutes a violation of the provisions of the California Commodity Law. This section has been amended to authorize the commissioner to include a claim for restitution or damages under the provisions of Chapter 8 (commencing with §29580) (civil liabilities) on behalf of the injured party in any suit for injunctive relief authorized by this section. Section 29560, as amended, also grants the courts jurisdiction to

award appropriate relief to the injured party if the court finds the enforcement of the rights of such person, whether by class action or otherwise, would be so burdensome or expensive to be impractical. Section 29563 has been added to authorize the commissioner to issue a desist and refrain order against any person who is engaging in activities which require a license under Chapter 2 (commencing with §29510) if he is not so licensed. This section also provides for administrative hearings by which an individual subjected to a desist and refrain order may contest the decision. If a hearing is not commenced within 15 days after request, then the order is automatically rescinded.

Sections 29543 and 29544 have been added to regulate the advertising of commodities. Section 29543 prohibits any person licensed or registered under Chapter 2 (commencing with §29510) from publishing any advertisement in this state concerning commodities, commodities contracts, or their services with respect thereto, unless a true copy of the advertisement has been filed with the commissioner at least three business days prior to the publication. Section 29544 prohibits any person from publishing an advertisement in this state concerning a commodity which is not regulated by the Commodity Exchange Act or any commodity contract regarding either such a commodity or the business of anyone licensed under Chapter 2 (commencing with §29510) once the commissioner has notified the advertiser that the advertisement contains false or misleading statements.

Chapter 8 (commencing with §29580) has been added to the Corporations Code to define the damages which an injured party may recover from anyone who violates specified sections of the California Commodity Law. Civil liability for a violation of this law is specifically limited to the sections delineated in Chapter 8 (commencing with §29580). Every cause of action under this chapter survives the death of any person who might have been a plaintiff or a defendant.

Section 29584 imposes a two-year statute of limitations (or one year from date of discovery) on actions arising under a violation of the licensing requirements of Sections 29510.1 through 29510.4 (licensing of commodity exchange, floor broker, commodity solicitor, commodity option issuer, and commodity salesman). This limitation also applies to actions arising under Section 29545 (prohibition against offering or selling commodity option contract or any guarantee thereof without a permit). A four-year statute of limitations (or one year from date of discovery) is imposed on actions arising under Sections 29525, 29526, and 29537.2 (restrictions on commodity advisor con-

tracts, prohibited conduct of persons licensed under Chapter 2, commencing with §29510, and violation of the regulations imposed by the commissioner on commodity contracts). Section 29590 provides that no provision of the California Commodity Law imposing liability applies to any act committed in good faith in conformity with any rule, form, permit, order, or written interpretive opinion of the commissioner, or any such opinion of the Attorney General.

See Generally:

- 1) Siegel, *Current Efforts in Consumer Protection in the Business-Investment Area*, 8 SAN DIEGO L. REV. 62, 64-65 (1971).

Business Associations; California Health Facilities Act

Health and Safety Code Chapter 2 (commencing with §1250) (repealed); Chapter 2 (commencing with §1250) (new); Welfare and Institutions Code §§16300, 16312 (amended).

SB 413 (Beilenson); STATS 1973, Ch 1202

Chapter 2 (commencing with §1250) has been added to the Health and Safety Code to revise and restructure state and local health planning functions, establish minimum health quality standards, and reform state licensing procedures for health care facilities. Section 1250 defines health facility as any facility, place, or building which is organized, maintained, and operated for the diagnosis, care, and treatment of human illness, physical or mental. Section 1254 specifies that the State Department of Health shall inspect and license all health facilities except those exempted by Section 1270 from the provisions of Chapter 2 (hotels and other similar places that furnish only board and room; any facility conducted by and for the adherents of any well-recognized church or religious denomination for the purpose of providing care or treatment of the sick who depend upon prayer or spiritual means for healing in the practice of the religion of such church or denomination).

Article 2 (commencing with §1265) provides that any person, political subdivision of the state, or governmental agency desiring a license for a health facility or approval for a special service (a unit of a health facility equipped to provide a specific type of patient care) under the provisions of Chapter 2 must file an application with the State Department of Health. Licenses issued pursuant to Chapter 2 are to expire 12 months from the date of issuance, and each special permit shall expire on the expiration date of the license. If an application is denied, the State Department of Health shall notify the appli-

cant in writing and the applicant has 20 days from the date of mailing to present a written petition for a hearing.

Article 2.5 (commencing with §1272) provides that the advisory board created by Chapter 1148 of the Statutes of 1972 is to be continued in existence. The function of this board is to assist, advise, and make recommendations to the Director of Health and the State Department of Health as to the establishment of rules and regulations necessary to insure proper administration and enforcement of provisions of Chapter 2 and, as such, to serve as consultants to the Director of Health.

Article 3 (commencing with §1275) provides that the State Department of Health shall adopt or amend regulations as to (1) standards of adequacy, safety, and sanitation of the physical plants of the health facilities, (2) the staffing of the facilities with duly qualified, licensed personnel, and (3) the services provided, based on the type of health facility and the needs of the persons served thereby. Licenses may be denied for failure to comply with such regulations. Section 1278 provides that any officer, employee, or agent of the State Department of Health may, upon presentation of proper identification, enter and inspect any building or premises at any reasonable time to secure compliance with or to prevent a violation of any provision of Chapter 2. Sections 1279 through 1282 provide for regular inspections (at least once a year) of the facilities and specify the composition of the inspection teams.

Article 4 (commencing with §1290) provides that anyone who willfully or repeatedly violates any rule or regulation promulgated under Chapter 2 is guilty of a misdemeanor and upon conviction is punishable by a fine not to exceed \$500, or imprisonment in the county jail for up to six months, or both. Section 1291 allows the Director of Health to bring a suit in superior court to enjoin any violation or threatened violation of Section 1253 (operating without a license).

Article 5 (commencing with §1294) makes provision for the suspension or revocation of any license or special permit (which are needed to operate special services) upon any of the following grounds: (1) violation of any provision of Chapter 2 or of any rules or regulations promulgated under Chapter 2; (2) aiding, abetting, or permitting the violation of any provision of Chapter 2 or of any rule or regulation promulgated under Chapter 2; or (3) conduct inimical to public health, morals, welfare, or safety in the maintenance or operation of premises or services for which a license is issued. Section

1296 allows the Director of Health to temporarily suspend any license or special permit prior to a hearing, if in the director's opinion it is necessary to protect the public welfare. The director shall immediately notify the licensee, and a hearing shall be held within 30 days after receipt of such notice.

Article 6 (commencing with §1305) requires every insurer providing professional liability insurance to a health facility licensed pursuant to Chapter 2 and every associated group of health facilities licensed pursuant to Chapter 2 which are self-insured to report at least once a year all final judgments or settlements over \$3,000 for damages for personal injury caused by an error, omission, or negligence by such health facility in the performance of professional services.

Business Associations; contractor advertising

Business and Professions Code §7030.5 (amended).

SB 609 (Stull); STATS 1973, Ch 153

(Effective July 6, 1973)

Support: Department of Consumer Affairs; Contractors' State License Board; Construction Industry Legislative Council

In 1972 Section 7030.5 was added to the Business and Professions Code to provide that anyone licensed under the Contractors' License Law [CAL. BUS. & PROF. CODE ch. 9 (commencing with §7000)] must include his license number in all construction contracts, subcontracts, calls for bid, and *all forms of advertising* as a contractor used by such person [S.B. 239, CAL. STATS. 1972, c. 124, at 165]. "Advertising" was defined in Section 7026.7 as including, among other things, the issuance of any card, sign, or device to any person. This version of Section 7030.5 was to take effect on July 1, 1973. Apparently, the definition of advertising encompassed by Section 7030.5 prior to amendment was overbroad and may have placed a prohibitive economic burden on many contractors [S.B. 609, CAL. STATS. 1973, c. 153, §2]. For example, a contractor who literally complied with this section might have to include his license number within a short commercial on a radio station, thus utilizing a significant portion of the allotted time for this purpose; or he might have had to include the number on indirect forms of advertising such as sports uniforms. Chapter 153 has been enacted to remedy this situation by requiring the license number only in forms of advertising prescribed by the Registrar of Contractors.

See Generally:

- 1) CAL. BUS. & PROF. CODE §7011 (registrar—appointment, compensation, and duties), §7065 (powers of the registrar).

Business Associations; Corporate Securities Law

Corporations Code §25532 (repealed); §§25003.5, 25205, 25212.1, 25232.1, 25232.2, 25532, 29500.5 (new); §§2406, 25102, 25104, 25130, 25131, 25143, 25214, 25215, 25219, 25220, 25233, 25302, 25534, 25550, 25608, 29539 (amended).

AB 768 (Knox); STATS 1973, Ch 390

Authorizes the Commissioner of Corporations, after appropriate notice and hearing, to censure an investment advisor's or broker-dealer's employee where the public interest warrants such action; makes it unlawful to work as or hire an employee in violation of the censure without the consent of the commissioner; provides that a licensed broker-dealer is subject to all of the provisions of the Corporate Securities Law and the rules of the commissioner; permits the commissioner to issue a cease and desist order against any person acting as a broker-dealer, investment advisor, or agent without a license; modifies requirements which must be met before certain security transactions will be exempted from the general requirement of qualification; authorizes the commissioner to suspend over-the-counter trading for a period of 90 days; defines business day and provides that time periods for specified administrative hearings will be computed in business days.

In 1968 California adopted a new corporate securities law, which became operative on January 2, 1969, entitled the "Corporate Securities Law of 1968" [CAL. CORP. CODE div. 1 (commencing with §25000)]. This law regulates all offers and sales of securities in California by providing that such offers and sales must be qualified with the Corporations Commissioner unless exempted [See CAL. CORP. CODE §§25110, 25120, 25310]. In order to facilitate the enforcement of this law, all agents, broker-dealers, and investment advisors are required to be licensed by the commissioner [CAL. CORP. CODE ch. 2 (commencing with §25210), ch. 3 (commencing with §25230)].

The regulatory powers of the commissioner have been expanded through the enactment of Chapter 390. Sections 25212.1 and 25232.1 have been added to the Corporations Code to authorize the commissioner to censure, suspend for up to 12 months, or bar from specified employment any officer, director, partner, employee of, or any other person performing similar functions for a licensed broker-

dealer or a licensed investment advisor. The commissioner must be acting in the public interest, and he must afford appropriate notice and opportunity for a hearing. Additionally, such employee must have committed an act or omission which would constitute grounds for the censure, suspension, denial, or revocation of a broker-dealer's or an investment advisor's certificate pursuant to Sections 25212 and 25232 (grounds for discipline of broker-dealer or investment advisor). Prior to the addition of these sections the commissioner had the authority to discipline a broker-dealer or an investment advisor for the acts of his employees, but he did not have the authority to discipline the employee [CAL. CORP. CODE §§25212, 25232].

Section 25214 has been amended and Section 25232.2 has been added to prohibit a broker-dealer or investment advisor from employing anyone who has been censured, suspended, or barred from employment pursuant to Sections 25212.1, 25232.1, and 29538.1 (grounds for disciplinary action against a broker-dealer's, investment advisor's, or commodity advisor's employee). A broker-dealer or investment advisor can be disciplined for a violation of this section only if: (1) he knew or should have known of the censure, suspension, or bar; and (2) the commissioner did not consent to the employment. These sections, as amended and added, also prohibit any person whose certificate as an agent has been suspended or revoked under Section 25213, or whose employment has been barred or suspended pursuant to Section 25212.1, from willfully becoming employed or being employed by an investment advisor, broker-dealer, or commodity advisor without obtaining the consent of the commissioner. The same prohibition against employment applies to an investment advisor whose certificate has been suspended or revoked pursuant to Section 25232 or whose employment has been barred or suspended under Section 25232.1.

Sections 25214 and 24232.2, as amended and added, allow any person who has been suspended or barred from employment under Section 25212.1 or 25232.1 to petition the commissioner for reinstatement or reduction of the penalty pursuant to the provisions of Section 11522 of the Government Code. A willful violation of either Section 25214 or 25232.2 may be punishable under Section 25540 which provides for a fine of up to \$10,000, or imprisonment in the state prison for not more than ten years or in the county jail for not more than one year, or both.

Section 25205 has been added to provide that a broker-dealer licensed under Section 25210 need not also be licensed under Section

25230 (investment advisor's license). However, all broker-dealers are now subject to all the provisions of Division 1 as though they were licensed as investment advisors.

Section 25532 has been added to authorize the commissioner to order any issuer or offeror of a security to desist and refrain from further offers or sales if, in the commissioner's opinion, the sale or offer is subject to qualification and is being offered or sold without being so qualified. The commissioner may also order any person acting as a broker-dealer, investment advisor, or agent without the appropriate license to desist and refrain from so acting until he has obtained a license. The procedure by which an individual who has been subjected to a desist and refrain order may contest the decision is also set forth in this section.

Certain security transactions are exempted from the general requirement of qualification. Section 25102 specifies those which are exempted in an issuer transaction. Subsection 25102(h) has been amended to provide that any offer or sale of voting common stock by a corporation incorporated in any state is exempted if immediately after the proposed sale and issuance there will be only one class of outstanding stock owned beneficially by no more than ten persons. Prior to amendment this exemption was only available to California corporations whose single class of outstanding stock was owned beneficially by no more than five persons. Subdivision (5) of this section has been amended to provide that the notice required for an issuer transaction to be exempted under Section 25102(h) shall be signed by an active member of the State Bar of California and filed with the commissioner within ten business days after the receipt of consideration for the securities by the issuer. The notice must contain an opinion by the member of the Bar stating that the exemption provided by Section 25102(h) is available for the transaction. For any corporation other than a California corporation, the notice must be accompanied by an irrevocable consent appointing the commissioner and his successors in office as the issuer's attorney to receive service of any lawful process in any non-criminal action which arises under the provisions of Division 1 or any rules or orders made by the commissioner pursuant thereto. This subdivision also provides that the service may be made by leaving a copy of the process in the office of the commissioner; however, the service is not effective unless: (1) the plaintiff sends a notice of the service and a copy of the process by registered or certified mail to the defendant at its last address on file with the commissioner; and (2) the plaintiff's affidavit of compliance with this section is filed in

the case on or before the return day of the process, if any, or within such further time as the court allows. Section 25104 specifies the non-issuer transactions which are exempt from qualification. Subsection 25104(h) exempts any offer or sale of a security if a qualification for any securities of the same class has become effective pursuant to other provisions of Division 1. This subsection has been amended to exclude from this exemption securities offered pursuant to a registration under the Securities Act of 1933 or pursuant to an exemption under Regulation A of that act if the aggregate offering price of the securities exceeds \$50,000. Sections 25130 and 25131 have been amended to allow qualification by permit pursuant to Section 25113 in the case of non-issuer transactions. Prior to amendment, qualification by permit was only available in issuer transactions.

Section 25219 authorizes the commissioner to summarily suspend all over-the-counter trading in this state by broker-dealers and agents in any security or to summarily suspend all trading in any security on any national securities exchange located in this state. This section has been amended to allow the commissioner to suspend such trading for a period of up to 90 days and for successive 90-day periods. Prior to amendment, the period was limited to ten days with successive ten-day periods.

Sections 25003.5 and 29500.5 have been added to define "business days" as all days other than every Saturday, Sunday, and such other days as are specified or provided for as holidays in the Government Code. Several sections of the Corporations Code dealing with administrative hearings have been amended to provide for the computation of time periods for filing, hearings, and appeals in terms of business days rather than days.

COMMENT

Section 25102(h), commonly referred to as the "close corporation exemption," has been drastically altered through the enactment of Chapter 390. The fact that the opinion of counsel regarding the availability of the exemption can no longer be based solely upon the facts contained in the notice to the commissioner is of extreme practical importance. Prior to amendment, an attorney was not "required to certify as to the existence of the facts giving rise to the exemption, but only that the facts stated under penalty of perjury by the parties to the transaction, if true, qualify the transaction for the exemption" [H. MARSH & R. VOLK, *PRACTICE UNDER THE CALIFORNIA CORPORATE SECURITIES LAW OF 1968* at 118 (1969)].

See Generally:

- 1) CAL. CORP. CODE §25003 (definition of agent), §25004 (definition of broker), §25009 (definition of investment advisor), §25017 (definition of "sell" and "offer"), §25019 (definition of security).
- 2) 2 H. BALLANTINE & G. STERLING, *CALIFORNIA CORPORATIONS LAW* ch. XXI (1970).
- 3) 3 WITKIN, *SUMMARY OF CALIFORNIA LAW, Corporations* §§128(a), 129(a), 136(a), 149-153 (Supp. 1969).
- 4) CONTINUING EDUCATION OF THE BAR, *CALIFORNIA CORPORATE SECURITIES LAW AND RULES* pts. 2, 3 (1968).
- 5) H. MARSH & R. VOLK, *PRACTICE UNDER THE CALIFORNIA CORPORATE SECURITIES LAW OF 1968* at 105-18 (1969).

Business Associations; credit unions

Financial Code §§14008.1, 14455 (new); §§14451, 14600, 14601, 14904, 15650, 15802 (amended).

AB 157 (McCarthy); STATS 1973, Ch 528

Under the provisions of Section 14502 of the Financial Code, the members of the credit committee of a credit union [See CAL. FIN. CODE §14500] are empowered to appoint one or more loan officers, with the approval of the board of directors. Such loan officers are authorized to approve loan applications within the limits set by the credit committee. Chapter 528 has amended Sections 14600 and 14601 to make loan officers criminally and civilly liable for making an illegal loan. Section 14600, as amended, provides that any officer, director, member of a committee of a credit union, or loan officer appointed pursuant to Section 14502 who knowingly permits a loan to be made or participates in a loan to a nonmember of the corporation is guilty of a misdemeanor. Section 14601, as amended, provides that such person violating Section 14600 is also primarily liable to the corporation for the amount of the loan. The illegality of the loan is no defense in an action by the corporation to recover the amount of the loan. Prior to amendment, only members, officers, or directors of a credit union committee were subject to the liability imposed by Sections 14600 and 14601.

Section 14904 grants authority to credit unions with assets of \$1,000,000 or more to make loans to members of the credit union within specified limits. This section has been amended by Chapter 528 to increase the amount a credit union may loan its members to a maximum obligation to the credit union of \$20,000 per member, plus the amount secured by shares of the credit union or certificates for funds, when the paid-in and unimpaired capital and surplus of the credit union is \$3,000,000 or more. Prior to amendment, the loan ceiling per member was set at \$15,000 plus the amount secured by shares of the credit union.

Section 15802 has been amended to decrease the time period from 90 days to 45 days after December 31 of each year in which a credit union must make a written report to the Corporations Commissioner containing a statement of the credit union's condition as of December 31 of each year. Section 15650 has also been amended to provide that whenever the members of the board of directors vote to recommend the dissolution of any credit union, the credit union shall not make any loans, withdrawal of shares, or certificates for funds until such time that the members either approve or disapprove the recommendation of the board of directors.

See Generally:

- 1) CAL. FIN. CODE §§14000, 14008 (credit union and central credit union defined).

**Business Associations; dealer, manufacturer,
or transporter licenses**

Vehicle Code §11705 (amended).

AB 416 (MacGillivray); STATS 1973, Ch 66

Support: Department of Motor Vehicles

Section 11705 of the Vehicle Code has been amended to allow the Department of Motor Vehicles to suspend or revoke the license of a dealer, transporter, or manufacturer of motor vehicles upon determining, after notice and hearing, that the licensee was *convicted* of a felony or crime involving moral turpitude. Prior to amendment, Section 11705 also required a determination, after notice and hearing, that the dealer, transporter, or manufacturer had *committed* the crime.

COMMENT

When the legislature amended Section 11705 in 1971, the word "committed" was added to the statute. This was in stark contrast to other license revocation provisions which merely require a showing of conviction [CAL. BUS. & PROF. CODE §§1000-1010, 1320, 1679]. By requiring a showing of commission of the crime, the revocation board was forced to relitigate the issue of guilt. Pursuant to Section 11705 as amended the board need merely prove conviction or a plea of *nolo contendere*.

See Generally:

- 1) CAL. BUS. & PROF. CODE §117 (record is conclusive proof).
- 2) CAL. BUS. & PROF. CODE §2765 (*nolo contendere*).
- 3) Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533 (1962).

Business Associations; employment agency's customer lists

Business and Professions Code §16607 (new).

SB 816 (Cusanovich); STATS 1973, Ch 1116

Section 16607 has been added to the Business and Professions Code to provide that an employment agency's customer list, including the names, addresses, and identity of all employer customers who have listed job orders with an employment agency within a period of 180 days prior to the separation of an employee from the agency, and including the names, addresses, and identity of all applicant customers of the employment agency, shall constitute a trade secret and confidential information of and shall belong to the employment agency. However, no liability shall attach to and no cause of action shall arise from the use of a customer list of an employment agency by a former employee who enters into business as an employment agency more than one year immediately following termination of his employment.

Business Associations; financial institutions

Financial Code §18617.2 (new).

AB 1141 (Sieroty); STATS 1973, Ch 284

Chapter 284 adds Section 18617.2 to the Financial Code to regulate advertising by industrial loan companies. Section 18617.2 prohibits an industrial loan company which issues thrift certificates from advertising ownership or affiliation with another entity unless the advertisement also states in a prominent manner whether or not the named owner or affiliate guarantees the thrift certificates issued by the loan company. A violation of Section 18617.2 is punishable as a misdemeanor [CAL. FIN. CODE §18054].

See Generally:

- 1) CAL. FIN. CODE §18617 (false or misleading advertising), §18617.1 (misrepresentations as to status of company or investment certificates).

Business Associations; franchises

Corporations Code §31113 (repealed); §§31003.5, 31113 (new); §§31114, 31117, 31157, 31211, 31402, 31403 (amended).

AB 657 (Knox); STATS 1973, Ch 539

Support: Department of Corporations

The Franchise Investment Law requires any person selling or of-

fering to sell a franchise to register with the Corporations Commissioner [CAL. CORP. CODE div. 5 (commencing with §31000)]. Section 31114 requires that an application for registration must be accompanied by a proposed offering prospectus. This prospectus must contain the material information set forth in the application for registration and such other disclosures as the commissioner may require. Previously, the commissioner could not require the applicant to disclose in his prospectus: (1) a conviction of a felony or unfavorable judgment in a civil action if the felony or civil action involved fraud, embezzlement, fraudulent conversion, or misappropriation of property; (2) a denial or suspension of registration as a securities broker by the Securities and Exchange Commission or the security commissioner of any state; or (3) a suspension or expulsion from membership of a national securities exchange or association. This prohibition has been deleted so that the commissioner may now require such disclosures in the prospectus.

Section 31113 of this act allows the commissioner to impound funds paid by a franchisee or subfranchisor to the franchisor if he finds: (1) the franchisor has failed to demonstrate adequate financial responsibility to fulfill his obligations to provide real estate, improvements, equipment, inventory, training, or other items included in the offering; and (2) such action is necessary and appropriate for the protection of prospective franchisees or subfranchisors. In order to avoid impoundment, the franchisor may furnish a surety bond as security for the satisfaction of his obligations. However, the aggregate liability of the surety shall not exceed the penal sum of such bond. Prior to this amendment, any funds impounded under the authority of this section had to be released at the time of the opening of the franchise business. The commissioner can now withhold such funds until the franchisor's obligations are satisfied, regardless of whether or not the franchise business has opened. This will protect franchisees who make large investments for inventory or services that will not be available until some time after the franchise opens.

Sections 31117, 31157, 31211, 31402, and 31403 provide for hearings on administrative orders made by the commissioner pursuant to the Franchise Investment Law. Previously, all hearings had to be held within 15 days after a request was received by the commissioner. These sections have been amended to provide that all hearings must be held within 15 business days (as defined in §31003.5) after receipt of a request.

See Generally:

- 1) CAL. ADMIN. CODE tit. 10, §310.113.4 (authority of commissioner to release funds upon satisfaction of franchisor's obligations), §§310.114-310.114.2 (requirements for offering prospectus).
- 2) CAL. CORP. CODE §31111 (information required in application).
- 3) 3 H. BALLANTINE & G. STERLING, CALIFORNIA CORPORATIONS LAW, *Franchises* ch. 11a. (1970).
- 4) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 296 (1971).
- 5) Augustine and Hrusoff, *The California Franchise Investment Law*, 46 CAL. S.B.J. 50 (1971).

Business Associations; home improvement salesmen

Business and Professions Code §7152 (amended).

SB 906 (Coombs); STATS 1973, Ch 115

(Effective June 26, 1973)

Support: Contractors' State License Board; California Retailers Association

In 1972 a comprehensive scheme for licensing and regulating home improvement salesmen was promulgated in order to protect homeowners from fraudulent sales tactics [CAL. BUS. & PROF. CODE art. 10 (commencing with §7150); Senator William E. Coombs, Press Release 73-18, June 31, 1973]. A misdemeanor penalty is provided for anyone acting as a home improvement salesman without registering with the Registrar of Contractors [CAL. BUS. & PROF. CODE §7153].

Prior to the enactment of Chapter 115, Section 7152 defined home improvement salesman as any person employed by a contractor licensed under Chapter 9 (commencing with §7000) to solicit, sell, negotiate, or execute home improvement contracts under which home improvements may be performed by the contractor. This definition allowed Article 10 to be literally interpreted as making it a misdemeanor for an employee of a large, established department store to enter into home improvement contracts without being registered [Senator William E. Coombs, Press Release 73-18, May 21, 1973]. Chapter 115 has clarified Article 10 by amending the definition of home improvement salesman to exclude: (1) sales persons whose sales are all made pursuant to prior negotiations between the parties at a business establishment with a fixed location where goods or services are offered or exhibited for sale; and (2) sales persons whose sales are all made pursuant to negotiations between the parties, when these negotiations are initiated by the prospective buyer at or to such business establishment.

Business Associations; limited partnership's tax status

Corporations Code §§15520, 15520.5 (repealed); §§15520, 15520.5 (new).

AB 1339 (Knox); STATS 1973, Ch 1049
(Effective October 1, 1973)

Section 15520 of the Corporations Code provides that the retirement, death, insanity, removal, or failure of re-election of a general partner dissolves the partnership unless the business is continued by the remaining general partners and/or the general partner or general partners elected in place thereof under either: (1) a right to do so stated in the limited partnership formation certificate [See CAL. CORP. CODE §15520]; or (2) with the consent of all the members of the partnership. This section has been amended to exclude from its provisions all partnerships which are now subject to Section 15520.5. Section 15520.5 has been added by Chapter 1049 and applies to all limited partnerships formed on or after November 1, 1973, and any other limited partnership which elects to be governed under this section through an amendment to its certificate. Section 15520.5 as added is the same as Section 15520 except that it does not permit the partnership to be continued by the election of new general partners in the place of former general partners. Section 15520.5 is to expire on December 31, 1975.

COMMENT

The Internal Revenue Service has taken the position that Section 15520 may permit the corporate characteristic of "continuity of life" because it specifically allows the election of new general partners in place of former general partners under a right to do so stated in the certificate [A.B. 1339, CAL. STATS. 1973, c. 1049, §3]. "Continuity of life" is one of the six characteristics which are examined by the Internal Revenue Service in determining whether an organization is taxed as a limited partnership or as an association [26 C.F.R. §301.7701-2(a) (1973)]. The Internal Revenue Service's position on Section 15520 has resulted in unsatisfactory private rulings on the partnership tax status of limited partnerships formed under the Uniform Limited Partnership Act of the State of California [A.B. 1339, CAL. STATS. 1973, c. 1049, §3]. Section 15520.5 brings the California act into conformity with the Uniform Limited Partnership Act [UNIFORM LIMITED PARTNERSHIP ACT §20], and now any limited partnership which is either (1) formed on or after September 1 or

(2) elects to be governed under Section 15520.5 will not be denied limited partnership tax status as the result of an adverse administrative interpretation of Section 15520.

See Generally:

- 1) 26 C.F.R. §301.7701-2 *et seq.* (1973).
- 2) Van Camp, *From Garden Apartments To Cattle To Pistachio Groves: Regulating Tax Shelters in California*, 4 PAC. L.J. 703, 711-12 (1973).
- 3) Hrusoff & Cazares, *Formation of the Public Limited Partnership*, 22 HAST. L.J. 87, 100 (1970).

Business Associations; Long-Term Care, Health, Safety and Security Act of 1973

Health and Safety Code Chapter 2.4 (commencing with §1417) (new).

AB 1600 (McCarthy); STATS 1973, Ch 1057

Opposition: California Association of Health Facilities

Chapter 1057 has enacted the Long-Term Care, Health, Safety and Security Act of 1973. The intent of the legislature in enacting this act was to establish: (1) a citation system for the imposition of prompt and effective civil sanctions against long-term health facilities in violation of laws and regulations of the state relating to patient care; (2) an inspection and reporting system to insure compliance with state statutes and regulations; and (3) a provisional licensing mechanism to insure that full-term licenses will only be issued to those long-term health care facilities that meet state standards (§1417.1).

The provisions of this act apply to any facility licensed pursuant to Chapter 2 (commencing with §1250) (hospital, institution, boarding home or other place for the care of persons, home-finding agencies, and establishments and institutions for the reception and care of mentally disordered persons, mentally retarded persons, and other incompetent persons) which: (1) maintains and operates a 24-hour skilled nursing service for care of chronically ill or convalescent patients, including mental retardation or alcoholism; or (2) provides supportive, restorative, and preventive health services in conjunction with a socially oriented program for its residents, and maintains and operates 24-hour services including board, room, personal care, and intermittent nursing care. Long-term health care facilities subject to this act also include nursing homes, skilled nursing facilities, extended care facilities, and intermediate care facilities, but acute care hospitals or other licensed facilities are not included except for that distinct part of such hospital or facility which provides such services.

Section 1419 provides that any person may, in writing, request inspection of any long-term health care facility by giving notice of an alleged violation of state law. The notice must be signed by the complainant and set forth the matters complained of with reasonable particularity. The substance of the complaint is not to be provided the licensee before the commencement of the inspection nor shall the complaint disclose the name of the individual complainant to the licensee. Section 1420 requires the State Department of Health upon receipt of the complaint to assign an inspector to make a preliminary review of the complaint; the department must notify the complainant of the inspector's name. Unless the department determines that the complaint was made in bad faith or without any reasonable grounds, it shall make an on-site inspection within ten working days of receipt of the complaint. Under most circumstances the complainant may accompany the inspector on his inspection. Under Section 1421, any authorized officer, employee, or agent of the State Department of Health may enter and inspect a facility at any time to enforce provisions of this chapter. No advance notice is to be given (unless previously and specifically authorized by the department or required by federal law) of such inspections, and any public employee giving advance notice shall be suspended without pay for a period to be determined by the Director of Health. Section 1422 provides that there shall be at least two general inspections every year of all licensed facilities.

If upon inspection the director determines that there is a violation of any statutory provision or rule or regulation (except with respect to violations determined to have only a minimal relationship to safety or health), he must not later than one day after the inspection issue a citation to the licensee. Each citation must be written and describe with particularity the nature of the violation and shall fix the earliest feasible time for elimination of the condition constituting the violation.

Citations are to be classified according to the nature of the violation as either class "A" or class "B". Class "A" violations include those presenting imminent danger to patients or guests or a substantial probability that death or serious physical injury will result. The condition constituting a class "A" violation is to be abated immediately unless specified otherwise by the department. Class "A" violations are subject to civil penalties of not less than \$1,000 or more than \$5,000 for each and every violation. Class "B" violations are those determined to have a direct or immediate relationship to the health, safety, or security of patients. The civil penalty for a class "B" violation is not less than \$50 nor

more than \$250 for each and every violation. If a class "B" violation is corrected within the time specified, no civil penalty shall be imposed. Where a licensee fails to correct any violation within the specified time, Section 1425 provides that a \$50 per day civil penalty shall be assessed for every day the condition persists after the specified correction date. Section 1426 requires the director to set forth the criteria and, where feasible, specific acts constituting class "A" and "B" violations.

A licensee may contest a citation or the proposed assessment of a civil penalty by contacting the Director of Health in writing within four business days of the service of the citation. A designee of the director shall within four business days of receipt of the notice of contest hold an informal conference. At the conclusion of the conference the designee may affirm, modify, or dismiss the citation or civil penalty. The licensee may contest a decision of the designee by contacting, in writing, the director within four days after receipt of the designee's decision. If the licensee fails to contest either the initial or subsequent decision within the time limit, such decision shall be deemed a final order and not subject to further administrative review.

The civil penalties authorized under this act are to be trebled for a second or subsequent violation within any 12-month period if a citation was issued for a previous violation occurring within such period and a civil penalty was assessed therefor. Action brought under the provisions of this act shall be set for trial at the earliest possible date and take precedence over all other cases except those to which equal or superior precedence is specifically granted by law.

Section 1429 provides that each citation for a class "A" violation which has become final, or copies thereof, must be prominently posted in a place in plain view of patients in the facility and persons visiting or inquiring about placement until the violation is corrected, up to a maximum of 120 days. Each citation for an "A" or "B" violation which has become final, or a copy thereof, must be retained by the licensee at the facility until the violation is corrected. A notice is to be posted in a prominent place informing all persons that copies of all final uncorrected violations will be made promptly available for inspection to any person who so requests.

Under Section 1430, a licensee who fails to correct a violation may be enjoined from permitting the violation to continue and/or sued for civil damages by the Attorney General. The remedies specifically provided by this act are in addition to any other remedy provided

by law. Additionally, Section 1431 provides that it is a misdemeanor for any person to willfully prevent, interfere with, or attempt to impede the lawful enforcement of provisions of this act.

Section 1432 subjects a licensee to up to a \$500 fine for any discrimination or retaliation against an employee or patient who has initiated or participated in any proceedings specified in this act. Any attempt to expel or any type of discrimination against a patient within 120 days of the filing of a complaint by him or on his behalf shall raise a rebuttable presumption that it is retaliatory.

Section 1437 provides that if a facility has not been previously licensed pursuant to Chapter 2 (commencing with §1250) of the Health and Safety Code the State Department of Health may only provisionally license the facility. A provisional license shall terminate six months from its issuance. Within 30 days of termination of the provisional license, the department shall give the facility a full and complete inspection, and if the facility meets the applicable requirements for licensing, a regular license shall be issued. If the facility does not meet the requirements for licensure but has made substantial progress towards meeting such requirements, the initial provisional license shall be renewed for one six-month period only.

Business Associations; personal property broker licensing

Corporations Code §25217 (amended); Financial Code §22012 (new); §§22011, 11053 (amended).

AB 2199 (Maddy); STATS 1973, Ch 713
(Effective September 21, 1973)

Chapter 713 has amended Section 25217 of the Corporations Code to provide that a broker-dealer who is licensed under the Corporate Securities Law [CAL. CORP. CODE §25000 *et seq.*] and makes loans which are subject to the Personal Property Brokers Law [CAL. FIN. CODE §22000 *et seq.*] shall also be licensed as a personal property broker. Those included within the class of personal property brokers are set out in Section 22009 of the Financial Code.

Section 22011 of the Financial Code has been amended to extend the definition of a "commercial loan" to include a loan which is made by a broker-dealer licensed under the Corporate Securities Law of 1968 and which is made in accordance with applicable provisions of the Corporate Securities Law of 1968, the Securities Act of 1933, the Securities Exchange Act of 1934, and the regulations of the Federal

Reserve Board. Section 22053 of the Financial Code excludes certain loans made by personal property brokers from most of the regulatory provisions of the Personal Property Brokers Law. This section has been amended to exclude a commercial loan made in accordance with the securities laws stated above.

Chapter 713 has added Section 22012 to the Financial Code to provide a guide for determining whether a loan secured by a security interest is in fact secured by personal property. The loan is secured by personal property if: (1) the security consists of shares of corporate stock and any dividends paid during the loan are either credited to or paid to the borrower and the borrower has the right, if any exists, to vote these shares; or (2) the security consists of evidence of a debt obligation of a corporation or government subdivision or agency and any interest received during the term of the loan is credited or paid to the borrower. Section 22012 also provides that the use and possession of these securities is retained by one other than the lender but anyone may have custody of them.

Prior to the enactment of this chapter those licensed under the Corporate Securities Law were making loans to their customers, but these loans were not regulated by the Corporations Commissioner. This chapter will place these loans under his regulation.

Business Associations; medical referral services

Health and Safety Code §445 (new).

SB 428 (Beilenson); STATS 1973, Ch 923

Section 445 has been added to the Health and Safety Code to provide that no person, firm, partnership, association, or corporation, or agent or employee thereof, shall for profit refer or recommend a person to a physician, hospital, health-related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition. The imposition of a fee is presumptive evidence that the recommendation or referral was given for profit. This section also prohibits physicians and health-related facilities from entering into contracts or other agreements with medical referral services located or doing business in another state, if the service would be prohibited in this state. The provisions of this section do not apply to services which are made: (1) under the crippled children services program or prepaid health plans; (2) by non-profit organizations; or (3) by any organization or association which is exempt from taxation pursuant to subdivision (c) of Section 501 of Title 26 of the United States Code.

A violation of this section is a misdemeanor punishable by imprisonment in the county jail for not longer than one year, or a fine of not more than \$5,000, or both. Any violation of this section may be enjoined in a civil action brought in the name of the people of the State of California by the Attorney General, except that the plaintiff shall not be required to allege facts necessary to show or tending to show lack of adequate remedy at law.

COMMENT

In *Brotherhood of R.R. Trainmen v. Virginia State Bar* the United States Supreme Court, relying heavily on *NAACP v. Button* [371 U.S. 415 (1963)], invalidated an injunction which restrained a railroad union from advising injured workers to obtain legal services and recommending specific attorneys [377 U.S. 1 (1964)]. The Court based its decision on the principle that the injunction would stifle an individual's right to associate and discuss. The Court stated, "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another" [377 U.S. at 5]. Chapter 923 may fall within the purview of these decisions because some organizations will be prohibited from advising their members in the selection of physicians or medical facilities. However, the *Button* and *Trainmen* cases can be distinguished. Chapter 923 is narrowly drawn to prohibit only the recommendation of a physician or medical facility *for profit*; therefore, it may be argued that the regulatory interest of the state justifies the adverse effect on group association.

See Generally:

- 1) CAL. BUS. & PROF. CODE §2399 (medical cappers).
- 2) *Morey v. Doud*, 354 U.S. 457 (1957); *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (equal protection with respect to economic classification).

Business Associations; mobilehome contractors

Business and Professions Code §§7026, 7027, 7045, 7046 (amended).

AB 630 (Harvey Johnson); STATS 1973, Ch 892

Section 7027 of the Business and Professions Code has been amended to include within the definition of "contractor" any person engaged in the business of constructing, installing, altering, repairing, or preparing for moving mobilehomes or mobilehome accessory

buildings and structures upon a site for the purpose of occupancy as a dwelling. Specifically exempted from this definition is a manufacturer of mobilehomes or mobilehome accessory buildings when: (1) the construction occurs at a site other than the site upon which it is installed for the purpose of occupancy as a dwelling; or (2) he is performing work in compliance with his warranty. However, the term contractor shall include the manufacturer when he is engaged in on-site construction, alteration, or repair of mobilehomes or mobilehome accessory buildings and structures pursuant to specialized plans, specifications, or models, or any work other than in compliance with his warranty. Prior to amendment, the definition of mobilehome contractor was limited to one engaged in the installation of mobilehomes upon a site for the purpose of human occupation.

With the enactment of Chapter 892, one who engages in the construction, alteration, repairing, or preparation for moving of mobilehomes or accessory structures without satisfying the provisions of the Contractors' License Law will have committed a misdemeanor and may be barred from recovering for his services [CAL. BUS. & PROF. CODE ch. 9 (commencing with §7000), §§7028, 7031].

Business Associations; mortgage loan broker advertising

Business and Professions Code §§10248.7, 10248.8, 10248.9 (new).
SB 310 (Whetmore); *STATS* 1973, Ch 583

Section 10248.8 has been added to the Business and Professions Code to provide that every real estate licensee subject to the provisions of Section 10248.7 must, prior to use, submit to the Department of Real Estate a true copy of any proposed advertisement which is intended to be used in connection with his mortgage loan brokerage activities. The Real Estate Commissioner must adopt regulations as to the filing of, criteria for, and clearance of such advertising which will insure that the public will be protected against false or misleading advertising. If within seven calendar days from its receipt the Department of Real Estate has not disapproved the advertisement, it is deemed approved. The department may, however, disapprove an advertisement for subsequent use. An advertisement means dissemination in any newspaper, circular, form letter, brochure, or similar publication, display, sign, radio broadcast, or telecast which concerns: (1) the use, terms, rates, conditions, or the amount of any loan made under the provisions of Article 7 (commencing with §10240) of the Business and Professions Code, or note evidencing such loan; or (2)

the security, solvency, or stability of any person transacting business under the provisions of Article 7.

With the addition of Section 10248.9 to the Business and Professions Code, every real estate licensee subject to provisions of Section 10248.7 must within 30 days of the close of his calendar or fiscal year make an annual report to the Real Estate Commissioner. This report must contain all of the following information: (1) the extent of advertising and promotion undertaken in anticipation of negotiating loans; (2) the direct costs attendant to negotiating loans and the charges, late payments, and foreclosure experience of the existing loan portfolio; (3) loan negotiation experience; (4) "balloon" payment experience; and (5) such other related information as the commissioner may require.

Section 10248.7 has been added to specify which real estate licensees are subject to the above regulations of Sections 10248.8 and 10248.9. Section 10248.7 includes any real estate licensee who meets all of the following requirements: (1) comes within the provisions of Section 10131(d) of the Business and Professions Code (soliciting, negotiating, collecting payment, or performing services for borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity); (2) has or intends to negotiate loans secured directly or collaterally by a lien on real property; (3) makes or will make at least fifty percent of the loans specified in (2) in a calendar year without them being secured directly or collaterally by first trust deeds (junior deeds which secure notes given back to a seller by a purchaser on account for the purchase price are not included); and (4) meets either of the following: (a) loans negotiated last calendar year or anticipated to be negotiated next calendar year will exceed 400; or (b) advertising and overhead directly related to advertising in connection with the mortgage loan brokerage activities amount to more than five percent of the gross revenue obtained by the licensee from activities for which a license is required. However, any licensee spending under \$10,000 per year in advertising is exempt from the provisions of Sections 10248.8 and 10248.9. The section also provides that licensees or entities under common management, direction, or control in relation to activities covered by Article 7 are to be considered as one licensee.

See Generally:

- 1) CAL. BUS. & PROF. CODE §§17502-17506 (misrepresentation in advertising).

Business Associations; Physical Therapy Practice Act

Business and Professions Code §2630 (amended).

SB 535 (Alquist); STATS 1973, Ch 503

Support: Physical Therapy Examining Committee

Section 2630 of the Business and Professions Code prohibits any person from practicing or offering to practice physical therapy, or holding himself out as a physical therapist, unless at the time of so doing he has a valid license issued under Chapter 5.7 (commencing with §2600). This section does not restrict activities authorized pursuant to Article 18 (commencing with §2510) (physical therapist's assistant) or Article 4.5 (commencing with §2655) (physician's assistant).

Prior to amendment, the licensing requirements of this chapter did not apply to the following persons: (1) a full-time assistant working under the orders, directions, and immediate supervision of a person licensed under the Business and Professions Code or by any initiative act (*e.g.*, physicians and chiropractors); (2) a registered nurse acting within the scope of her license; (3) a nonregistered nurse acting under Section 2731; (4) employees of the United States government, or agency thereof, performing the duties required by their employment; (5) a salesman demonstrating physical therapy equipment; and (6) one administering a massage, external bath, or normal exercise. These exceptions have been deleted by this amendment. As amended, the licensing requirements of Section 2630 do not apply to: (1) an aide to a licensed physical therapist, provided that the aide is at all times under the orders, direction, and immediate supervision of the licensee; and (2) any person administering a massage, external bath, or normal exercise not a part of physical therapy treatment. An aide is not, however, authorized to independently perform physical therapy or any physical therapy procedure.

A violation of this section is a misdemeanor, punishable by a fine not exceeding \$500 or imprisonment not exceeding six months, or both [CAL. BUS. & PROF. CODE §2670]. Also, an injunction may be issued, on application by the Board of Medical Examiners or by ten licensed physical therapists, against any person violating or about to violate this section [CAL. BUS. & PROF. CODE §2672].

Business Associations; rate setting by common carriers and warehousemen

Public Utilities Code §496 (new).

AB 1627 (Powers); STATS 1973, Ch 908

Chapter 908 has been enacted to give the Public Utilities Commission authority to approve agreements by common carriers and warehousemen to set rates, fares, classifications, divisions, allowances, or charges, or rules and regulations relating thereto. The commission may approve these agreements between common carriers so long as they are not: (1) between a carrier by highway and a carrier by rail unless such agreement is limited to matters relating to transportation under joint rates or over through routes; (2) agreements with respect to the pooling or division of traffic, service, or earnings; or (3) agreements which establish a procedure for the determination of any matter through joint consideration unless it finds that the parties have the unrestrained right to take independent action in spite of the determination. The commission may approve agreements between warehousemen so long as they meet the requirements of (2) or (3) above. The chapter expressly exempts these agreements from the California antitrust laws [CAL. BUS. & PROF. CODE div. 7 (commencing with §16700)].

Section 496 also authorizes the commission to investigate any agreement, or term of approval of an agreement, it previously approved under this section. The commission may terminate the agreement or modify the terms of approval. No order under this section is to be issued without a hearing.

COMMENT

These agreements by carriers and warehousemen have been made regularly even though they likely violate the California antitrust laws. The federal government recognized the necessity for these agreements and exempted them from the provisions of the Sherman Antitrust Act by a later enactment [49 U.S.C. §5(b) (1971)]. This chapter, which is in many respects a copy of Section 5(b), gives the same exemption for California antitrust law and also includes warehousemen.

Business Associations; recordation of documents

Commercial Code §§9407.1, 9407.2, 9407.3 (new).

SB 934 (Stiern); STATS 1973, Ch 591

Section 9407.1 has been added to the Commercial Code to provide that in lieu of *filing* all financing statements, termination statements, partial releases, assignments, or other related papers falling under this code, the filing officer may *record* such papers. Should the filing

officer choose to record rather than file all financing statements and related papers, he may employ a system of microphotography.

Pursuant to Section 9407.2, the filing officer shall mark each financing statement with a consecutive file number. All other related papers affecting such financing statement shall thereafter bear the same file number and shall be indexed under the name of the debtor (or assignor or seller) in a separate index or in his general index and under the file number of the original statement. Section 9407.3 provides that upon recording the financing statement or other related papers, the original or copy shall be returned to the parties entitled to them. When a document is filed, the actual document must be retained [CAL. COMM. CODE §§9403, 9407; CAL. GOV'T CODE §34327].

Business Associations; resume and employment counseling services

Business and Professions Code §9902 (amended).

SB 506 (Deukmejian); STATS 1973, Ch 310

Support: California Employment Agency Association; Department of Consumer Affairs

Section 9902 of the Business and Professions Code defines "employment agency" for purposes of the Employment Agency Act [CAL. BUS. & PROF. CODE ch. 21 (commencing with §9900)]. Prior to the enactment of Chapter 310, the definition included any person, service, bureau, organization, or club which by advertisement or otherwise offers, as one of its main objects or purposes, to procure employment for any person who will pay for its services, or which collects dues, tuition, or membership or registration fees of any sort, where the main object of the person paying the same is to secure employment. Section 9902 has been amended to include resumé services and employment counseling services within the definition of an employment agency.

COMMENT

The strict control over fee collection and the potentially high license fees imposed upon employment agencies pursuant to the provisions of the Employment Agency Act [CAL. BUS. & PROF. CODE §§9973-9976, 9997] has apparently caused some businesses to avoid licensure as an employment agency by asserting that the nature of their business is not covered by the provisions of Section 9902. Hence, clarification as to which businesses constitute employment agencies subject to the

Employment Agency Act has become essential. Chapter 310 adds to the specificity of Section 9902 by including resumé services and employment counseling services within its provisions. As a result, resumé services and employment counseling services will now have to file, obtain a license, pay license fees, post a bond, keep records, and otherwise comply with the regulatory provisions of the Employment Agency Act.

See Generally:

- 1) CAL. BUS. & PROF. CODE §9900 *et seq.* (Employment Agency Act).
- 2) 54 OPS. ATT'Y GEN. 186, 188 (1971) (employment agencies organized for overseas job placement).

Business Associations; savings and loan associations

Financial Code §§7184, 7609, 9205 (amended).

AB 979 (Deddeh); STATS 1973, Ch 798

Section 7609 of the Financial Code provides that any attachment levied upon shares or investment certificates of a savings and loan association is not effective unless the copy of writ and notice is left with an officer of the branch at which the shares or investment certificates were issued or, if this branch is no longer being maintained, the copy must be left at the principal office of the association. This section has been amended to require compliance with the provisions of this section regardless of any other provisions of law relating to the service of attachments [See, *e.g.*, CAL. CODE CIV. PROC. §542(5) (attachment of intangible personal property)].

Section 7184 of the Financial Code sets monetary and temporal limitations on an association's authority to make loans and advance credit for the purpose of financing repairs, alterations, improvements, or equipment on residential real property. This section has been amended to provide that an association may loan up to \$10,000 on any one loan or advance when aggregated with the balance of all outstanding loans relating to the same real property made by the association under the sole authority of this section. Previously, such loans were limited to \$5,000. Subdivision (c) of this section has been amended to allow an association to loan up to the equivalent of five percent of its total assets for financing repairs, alterations, and improvements and up to five percent for financing equipment. Previously, the limitation was five percent for the combined categories.

Business Associations; Tax Preparers Act

Business and Professions Code Chapter 20.6 (commencing with §9891) (new); Revenue and Taxation Code §§17037, 23060 (new).

AB 320 (Knox); STATS 1973, Ch 870

The Tax Preparers Act has been added to the Business and Professions Code to provide a comprehensive system for the registration, bonding, and regulation of tax preparers [CAL. BUS. & PROF. CODE ch. 20.6 (commencing with §9891)]. Article 1 (commencing with §9891) of Chapter 20.6 defines a "tax preparer" as any person, other than an employee, who as part of the regular clerical duties of his employment prepares his employer's tax return or an employee, representative, partner, agent, officer, or member of a registered tax preparer who, for a fee, assists with or prepares tax returns for others. A franchisee of a tax preparer is a separate tax preparer and subject to the provisions of this chapter. Specifically exempted from the provisions of this chapter are: (1) persons regulated by the State Board of Accountancy; (2) members of the State Bar of California; (3) trust companies and trust businesses as defined in Chapter 1 (commencing with §99) of the Financial Code; (4) banks regulated by the state or federal government; and (5) any person who is authorized to practice before the Internal Revenue Service pursuant to Subpart A (commencing with §10.1) of the Code of Federal Regulations (recognition of attorneys, certified public accountants, enrolled agents, and other persons representing clients before the Internal Revenue Service).

Article 2 (commencing with §9891.10) provides for the administration of the Tax Preparers Act. The duty of enforcing and administering the provisions of Chapter 20.6 is vested in the Chief of the Division of Consumer Affairs. The chief, with the approval of the Director of Consumer Services, has the authority to adopt rules and regulations which are reasonably necessary to carry out the purposes of this chapter. The chief is additionally empowered to investigate any violations of this act.

Article 3 provides the registration procedures for the Tax Preparers Act. On or after July 1, 1974, it will be unlawful for any person to act as a tax preparer without being registered [CAL. BUS. & PROF. CODE §9891.24]. Anyone so acting has committed a misdemeanor which is punishable by a fine of not less than \$50 or more than \$500, or by imprisonment for a period of not more than 60 days, or both.

The grounds upon which the chief may refuse to validate, suspend, or revoke the registration of a tax preparer are: (1) authorizing or making a fraudulent, untrue, or misleading statement which is intended to induce persons to use the tax preparation service of the tax preparer; (2) obtaining the signature of a customer to a tax return or authorizing document which contains blank spaces to be filled in after it has been signed; (3) failing or refusing to give a customer, for his own records, a copy of any document requiring his signature within a reasonable time after the customer signs such document; (4) failing to maintain a copy of any tax return prepared for a customer for the applicable statutes of limitation periods; (5) engaging in any fraudulent conduct; (6) violating the advertising prohibitions set forth in this chapter; (7) failing to promptly report changes in his tax preparer's registration; (8) disclosing information obtained in the preparation of taxes in violation of Section 17530.5 of the Business and Professions Code or Section 7216 of the Internal Revenue Code; (9) failing to post the proof of a valid registration, supplied by the chief, in each tax preparer location; and (10) failing to sign a customer's tax return as prescribed by the chief [CAL. BUS. & PROF. CODE §9891.25]. Additionally, the chief may refuse, suspend, or revoke a certificate because the applicant or tax preparer has entered a plea of guilty or *nolo contendere*, or has been convicted of a crime involving moral turpitude notwithstanding a subsequent modification in the sentence imposed. In addition to the refusal, suspension, or revocation of a tax preparer's certificate, the chief, with the approval of the director, may petition the superior court to enjoin any person who acts as a tax preparer in violation of the provisions of this act or any regulation adopted pursuant thereto (§9891.31).

In any case in which the chief determines that a tax preparer has committed a violation of this act which requires disciplinary action, the chief must file an accusation pursuant to the procedure specified in Chapter 5 (commencing with §11500) of the Government Code. Upon receiving notice of the accusation, the registrant may, in addition to requesting a hearing, submit an assurance of voluntary compliance. If the chief accepts the assurance, he cannot proceed with disciplinary action. An assurance of voluntary compliance cannot be used as evidence of a prior violation of this chapter; however, a violation of its terms is sufficient grounds for revocation or suspension of the tax preparer's certificate. The chief may, as a condition to accepting the assurance, require the tax preparer to do any of the following: (1) pay all reasonable costs of investigation incurred in detecting

violations committed by the tax preparer, not to exceed \$500; (2) establish procedures which will enable him to avoid future violations; and (3) comply with such requirements as may be necessary to protect the public interest and to protect the interests of the persons for whom the registrant has prepared tax returns.

Article 3 also provides for: (1) the manner in which a tax preparer may apply for registration; (2) the filing of a single application by any tax preparer maintaining more than one tax preparer location; (3) the maintenance of records by tax preparers; (4) the manner in which a tax preparer may contest a decision to refuse, suspend, or revoke a certificate; (5) notification by the chief in case of a refusal to validate a registration; (6) the authority of the chief to invalidate, revoke, or suspend an expired registration; (7) civil actions against a tax preparer; and (8) the continuing validity of the provisions of this chapter although some provisions or the application thereof to any person or circumstance may be held unconstitutional.

Article 4 (commencing with §9891.35), Article 5 (commencing with §9891.37), and Article 6 (commencing with §9891.40) provide for: (1) the deposit of a surety bond by the tax preparer; (2) a prohibition against the use of registration for advertising purposes; and (3) the collection of registration fees.

See Generally:

- 1) CAL. PEN. CODE §1203.4 (allowing a person to withdraw his plea of guilty, setting aside the plea or verdict of guilty, or dismissing the accusation or information).

Business Associations; thrift account guarantee

Financial Code §§18804, 18997, 18999 (new); §§18970, 18985 (amended).

AB 1617 (Sieroty); STATS 1973, Ch 821

Section 18960 of the Financial Code provides that the purpose of the Thrift Guaranty Corporation of California (hereinafter referred to as "Guaranty Corporation") is to guarantee full payment of thrift obligations of members, as specified in Sections 18952 and 18964, of up to \$10,000 for each account. Chapter 821 has enacted Section 18804 to require the Commissioner of Corporations to make annual examinations of the affairs and records of industrial loan companies which are involved in the following transactions: (1) lending; or (2) executing purchase or discount notes, contracts, or other commercial paper insured by federal or state agencies (*e.g.*, Federal Housing Ad-

ministration, Veterans Administration). These examinations must be commenced upon receipt by the commissioner of written notification that the loan company intends to engage in or is engaging in the above-mentioned transactions. However, if such company notifies the commissioner of its election to discontinue such activity and gives evidence that it has disposed of all evidences of indebtedness arising from any such transactions, an examination need not be performed.

Section 18970 provides for the establishment of a fund by Guaranty Corporation to guarantee the payment of thrift obligations. If it is found that the assets are deficient on March 15 of any year, Guaranty Corporation is required to assess against its members to make up the deficiency. Section 18970 has been amended to indicate that the fund is deficient if it contains less than *either* \$1,000,000 *or* one-half of one percent of the total outstanding thrift obligations of all members as shown on the most recent independent audit reports, required by Section 18610. Prior to amendment, the section provided that the fund was deficient only if it contained less than \$1,000,000. As amended, the section also provides that, in the event of an assessment against the members of Guaranty Corporation, the amount assessed against each member shall be the lesser of the following: (1) fifteen-hundredths of one percent of its outstanding thrift obligations as shown by its most recent Section 18610 audit; or (2) one-third of one percent of its outstanding thrift obligations, shown by the most recent Section 18610 audit, *less* the amount of Guaranty Corporation's account balance on March 15 of that year. The section previously provided that in the event of such a deficiency assessment, the amount levied was required to equal either one-fifteenth of one percent of such outstanding thrift obligations, or that amount necessary to bring the fund total to the necessary \$1,000,000 level. In addition, Section 18970 has been amended to provide that where the fund is in excess of *both* \$1,000,000 *and* one-half of one percent of the total outstanding thrift obligations of all members, shown by the most recent Section 18610 audit, Guaranty Corporation shall refund to the members an amount equal to the lesser of the above surpluses. Each member shall receive a part of the refund in proportion to the total aggregate assessment contributions the member has made to the corporation. Previously, any excess over \$1,000,000 was refunded regardless of the amount of outstanding thrift obligations of the members.

Section 18985 authorizes the Guaranty Corporation to submit reports and make recommendations to the commissioner regarding the financial condition of any member. Chapter 821 has amended the

section to additionally provide that in order to facilitate Guaranty Corporation to fulfill its obligations imposed pursuant to this section it may do the following: (1) it may make written request for a copy of unaudited financial statements filed by a member industrial loan company pursuant to Section 18610 and for a copy of the commissioner's analysis of such a company's receivables; and (2) at its own cost, it may appoint an accountant to prepare an audit report containing audited financial statements, together with such other information as Guaranty Corporation, in good faith, requires regarding the financial condition of any member. Such statements are *not* public documents, but are privileged information, and abuse of such privilege shall result in the imposition of misdemeanor liability upon the violator.

Chapter 821 has added Section 18997 to the Financial Code to provide that a member of Guaranty Corporation is entitled to receive from Guaranty its account balance, when it has redeemed its outstanding thrift obligations and has filed an undertaking with the commissioner not to issue thrift obligations. Such a disbursement is conditioned upon the following: (1) the existence of sufficient assets in the member's account balance to cover obligations of Guaranty Corporation under Section 18980; (2) the commissioner's written approval to Guaranty Corporation to pay the member; (3) the disbursement (less any unpaid demand made by the commissioner pursuant to Section 18981) will not reduce the amount in the guarantee fund on the preceding March 15 to less than either \$1,000,000 or one-half of one percent of the total outstanding thrift obligations of all the members; (4) one year has elapsed from the March 15 following the date the member filed his undertaking with the commissioner; and (5) should more than one member be entitled to such a disbursement before March 15 of any year, and there are insufficient funds in Guaranty Corporation to pay each or all such claimants *in full*, such claimants shall share the funds on a pro rata basis. However, all amounts due, but not paid, to members previously filing an undertaking shall be paid *in full* before newly entitled members are paid. Chapter 821 has also added Section 18999 to the Financial Code to provide for the distribution of Guaranty Corporation's assets to the members thereof in the event of its dissolution.

See Generally:

- 1) CAL. FIN. CODE div. 7 (commencing with §18000) (industrial loan companies).
- 2) CAL. ADMIN. CODE tit. 10, §250.3 *et seq.* (Commissioner of Corporations—administration and enforcement).

Business Associations; vehicle franchises

Vehicle Code §§232, 296, 297, 331, 331.1, 331.2, 350, 388, 389, 507, 512, 11713.1, 11713.2, 11726, 11727, Article 4 (commencing with §3060), Article 3 (commencing with §11900) (new); §§320, 3000, 3050, 3051, 9262, 9550, 9552, 11700, 11701, 11702, 11703, 11703.1, 11704, 11705, 11706, 11708, 11719, 11723, 11724, 11900 (amended).

AB 225 (Gonsalves); STATS 1973, Ch 996

Chapter 996 has declared the legislative finding that it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent motor vehicle dealer by the manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises. Chapter 996 has also created the New Motor Vehicle Board (replacing the New Car Dealers' Policy and Appeals Board) to effectuate these ends. Finally, Chapter 996 has defined the rights of the franchisee by delineating those activities of the franchisor which impinge on those rights and are therefore deemed unlawful.

Various sections of the Vehicle Code have been amended to expand the new motor vehicle sales licensing requirements to include manufacturer branches, distributors, distributor branches, and representatives. These sections provide the procedures for issuance, suspension, or revocation of licenses which previously applied only to manufacturers, transporters, dealers, and salesmen.

Section 3000 of the Vehicle Code has been amended to create the New Motor Vehicle Board. Section 3050 has been amended to give to that board all the functions previously performed by the New Car Dealers' Policy and Appeals Board and, in addition, to give it the power to hear and consider a protest by a franchisee made pursuant to Section 3060, 3062, 3064, or 3065.

Section 3060 has been added to the Vehicle Code to prohibit the termination or alteration by a franchisor of any existing franchise without either adequate notice to and approval by the board or written consent of the franchisee, unless the franchisee has failed to file a protest with the board within the appropriate time period (enumerated in the section). Section 3062 prohibits the opening of a new franchise or the relocation of existing franchises in a relevant market area (defined §507) where the same-line make is then represented, unless

agreed to by the other dealers in the area or unless approved by the board after timely filing of a protest by such other dealers. Section 3064 requires a franchisor to submit to the board a copy of the delivery and preparation obligations of the franchisee and a schedule of compensation to be paid franchisees for work and services performed in connection with such delivery and preparation. The compensation shall be reasonable and subject to the approval of the board, providing the franchisee files a notice of protest of such compensation. Section 3065 provides a similar procedure for review by the board of the adequacy of compensation paid to the franchisee for labor and parts used to fulfill the warranty obligations of the franchisor. In determining the adequacy of such compensation, the board may take into account the labor rate charged to retail customers of the franchisee. Also, a franchisor must either return to the franchisee parts claimed to be defective, such claim having been rejected by the franchisor, or reimburse the franchisee for the part not returned.

Section 3066 sets out procedures for notification of interested parties of any hearing on any protest under the above sections and procedures for the hearing itself. It provides that the burden of proof shall be on the franchisor if the protest is under Section 3060 or 3062, and on the franchisee if under Section 3064 or 3065. Section 3067 requires the board to send copies of its written decision on any claim to all parties involved. Failure of the board to make a decision within 30 days after the hearing is deemed an approval of the proposed action. Section 3068 allows either party to seek judicial review of final decisions of the board within 45 days of notice of the decision.

Sections 11713.1 and 11713.2 essentially prohibit the franchisor from impinging on the rights of the franchisee as defined by the prohibitions of those sections. Section 11713.1 makes it unlawful and a violation of the Vehicle Code for any licensed manufacturer or manufacturer branch, distributor, or distributor branch to coerce or attempt to coerce any dealer in this state to: (1) order or accept delivery of any commodities not required by law; (2) order or accept delivery of any motor vehicle with equipment not included in the list price of the vehicle as advertised by the manufacturer or distributor; (3) order for any person any commodity whatsoever; (4) participate in any advertising or promotional activities at the expense of the dealer; or (5) enter into any agreement or do any other act prejudicial to the dealer by threatening to cancel a franchise or any contractual agreement between the franchisor and the dealer.

Section 11713.2 makes it unlawful for any manufacturer or manufacturer branch, distributor, or distributor branch to: (1) unreasonably refuse or fail to deliver, in reasonable quantities and within a reasonable time, any new vehicle or parts or accessories which are publicly advertised as being available for delivery or actually being delivered; (2) unreasonably prevent or require, by contract or otherwise, any change in the capital structure of a dealership or the means by which the dealer finances the operation of the dealership, provided that no change in the capital structure shall cause a change in the principal management or have the effect of a sale of the franchise without the consent of the manufacturer or distributor; (3) prevent or require a dealer to change his executive management, other than the principal dealership operator if the franchise was granted the dealer in reliance upon the personal qualifications of such person; (4) prevent or require the sale or transfer of any interest in a dealership; however, the franchise, or any right thereunder, may not be assigned or transferred without the consent of the manufacturer or distributor not unreasonably withheld; (5) prevent a dealer from receiving fair and reasonable compensation for the value of the franchised business; (6) obtain any benefit from any person doing business with the dealer because of such business other than as compensation for services rendered; (7) require a dealer to prospectively assent to measures which would relieve the franchisor from liability under this article; (8) increase prices of motor vehicles which the dealer had ordered for private retail consumers prior to receipt of the written official price increase notification; (9) fail to pay a dealer within a reasonable time any agreed payment by reason of the fact that a new vehicle of a prior year model is in such dealer's inventory at the time of introduction of new model vehicles; (10) deny the designated heirs of a deceased owner of a dealership an opportunity to participate in the ownership of such dealership under a franchise for a reasonable time after the death of such owner; (11) give preferential volume discounts, or other inducements, to preferred persons bidding for governmental fleet purchases, without offering the same discounts to all dealers; (12) modify, replace, enter into, relocate, terminate, or refuse to renew a franchise in violation of Article 4 (commencing with §3060); (13) employ an unlicensed representative; (14) deny a dealer the right of free association with any other dealer; (15) directly compete with a dealer (exceptions specified); (16) unfairly discriminate among its franchises with respect to warranty reimbursement or adjustments; and (17) sell vehicles to persons not licensed under this chapter for resale.

Section 11726 has been added to allow any licensee to recover damages or obtain injunctive relief in a court action based on a willful failure to comply with any provision of Article 1 (commencing with §11700) or 3 (commencing with §11900), or Article 3 (commencing with §3052), or any regulation or rule of the Department of Motor Vehicles or New Motor Vehicle Board. Article 3 (commencing with §11900) has been added to require and provide procedures for the licensing of representatives (defined §512). Such procedures are substantially the same as those required for the licensing of manufacturers and distributors (§11700 *et seq.*). Chapter 996 will become operative on July 1, 1974.